No. 89-826

In The

Supreme Court of the United States

October Term, 1989

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
A California Corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Seven

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, County of Los Angeles, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven.

STATEMENT OF THE CASE

A. The Petition's False Premises.

The questions framed in the petition and reasons asserted for granting the writ rest entirely on false premises. In particular, petitioner repeatedly misstates what occurred on remand from this Court's prior decision. The Court of Appeal did not violate this Court's instructions on remand, let alone "thumb its nose" at those instructions. [Pet., p. i (Question 1), pp. 3, 7-14, 28] Nor did it "defy" any of this Court's holdings. [Pet., pp. 2-3, 7, 18] On the contrary, the Court of Appeal simply decided the precise issues which this Court said remained open on remand, and did so *entirely* in accordance with the legal precepts and standards established by this Court.

As the Court of Appeal pointed out, this Court was careful to limit its 1987 holding in the instant case to the ~~r issue of~~ whether the Fifth Amendment mandates payment of compensation *if* a land use regulation is determined to have gone so far as to amount to a regulatory "taking" of property. Because of the procedural posture in which the case came before this Court after the Court of Appeal's original decision, this Court was able to isolate and decide that remedy issue, without deciding whether respondent's Interim Flood Protection Ordinance actually amounted to a taking. [Pet. (Opinion), pp. A2, A5-A10] Nor did this Court purport to express any opinion as to the adequacy of petitioner's complaint under California pleading rules to allege sufficient *facts* (as

distinguished from bare conclusions) to be entitled to a trial on that issue.[1]

After addressing those open issues on remand, the Court of Appeal concluded that petitioner had failed to allege sufficient facts to state a cause of action for an unconstitutional regulatory taking of its property. Accordingly, the trial court's judgment dismissing petitioner's inverse condemnation claim based on the ordinance was affirmed on this new ground, and the case was remanded to the trial court for further proceedings on one of petitioner's *other claims*, in accordance with the appellate court's 1985 decision. [Pet. (Opinion), pp. A2, A28-A29] The basis for its determination that no taking claim had been stated was succinctly summarized by the Court of Appeal as follows:

> "We decide appellant failed to state a cause of action for two independent and sufficient reasons: (1) The interim ordinance in question substantially advanced the preeminent state interest in the public safety and did not deny appellant all use of its property. (2) The interim ordinance only imposed a reasonable moratorium for a

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[1] It should be noted that Appendix A to the Petition, setting out the Court of Appeal's opinion, contains a typographical error on page A2 which changes the meaning of the sentence. On line 4, the word "no" is actually "an". The sentence should read: "The high court held a landowner is entitled to compensation – not merely injunctive relief – when a court finds there has been *an* unconstitutional regulatory taking." (Emphasis added) Appendix A also does not reflect the changes made by the Court in its June 23, 1989 order modifying the Opinion. [Pet., Appendix B, pp. B1-B2] The published Opinion (210 Cal.App.3d 1353) does include these corrections, as well as a corrected identification of counsel for respondent on remand.

> reasonable period of time while the respondent conducted a study and determined what uses, if any, were compatible with public safety." [Pet. (Opinion), p. A2]

Petitioner's repeated assertions that the Court of Appeal decided these issues "without any factual record" are *absolutely false*. [Pet., pp. 2-3, 7-12, 28] As we will discuss more fully *infra*, the court properly took judicial notice of the actual provisions of the disputed Interim Flood Protection Ordinance, the permanent ordinance which later replaced it, the County Planning Commission's findings and recommendations that led to the adoption of the permanent ordinance, and various other provisions of respondent's zoning and building codes applicable to the subject property. [Pet. (Opinion), pp. A19-A22] In addition, there was in fact a *trial* in this case, on *other related causes of action*, prior to the original appeal.[2] The record on appeal contained a *wealth of evidence* adduced in that trial concerning the location and character of the petitioner's property and the devastating effects of the flood. [Pet. (Opinion), pp. A2-A5] This provided the Court of Appeal with more than enough record to justify its conclusion that petitioner failed to allege sufficient facts to establish a regulatory taking of its property, and could not possibly do so.

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[2] Petitioner also contended that respondent and the Los Angeles County Flood Control District were liable for the destruction of all of the buildings and improvements on petitioner's campground property, caused by the very flood which led to the adoption of the Interim Flood Protection Ordinance. [Pet. (Opinion), pp. A4-A5]

B. Nature And Uses Of Petitioner's Property Prior To The Flood and Ordinance.

Petitioner's property consists of a 21 acre private campground known as "Lutherglen," located in the mountains of the Angeles National Forest, north of the city of Los Angeles, about 23 miles from the suburban city of Glendale. [Pet. (Opinion), p. A2; Complaint, Clk. Tr. 6; Rep. Tr., 245-247, 316, 318]

Lutherglen is located in a narrow canyon. Mill Creek, which flows through the canyon, is a natural water course fed by drainage from the surrounding mountains. [Pet. (Opinion), pp. A2-A3] Petitioner purchased the property in 1957 and, over the next 20 years, built various structures and recreational facilities on the premises using mostly donated labor and services. These improvements included a dining hall, bunk house, caretaker's lodge, outdoor chapel, swimming pool, volleyball court, and a footbridge across Mill Creek. [Pet. (Opinion), p. A2; Rep. Tr., 317-318, 332, 348, 392, 476] All of the buildings and other structures in Lutherglen (except two water tanks) were located on 12 acres of "flat" land at the bottom of the canyon along the sides of the creek. [Pet. (Opinion), p. A2; Rep. Tr., 247]

Lutherglen was zoned "R-R" (Resort and Recreation) which is a classification established to provide for outdoor recreation and agricultural uses suitable for development without significant impairment to the resources of the area. [Pet. (Opinion), p. A19; County Zoning and

Planning Code §22.40.180.][3] The "R-R" zone prescribes numerous *permitted* uses (§22.40.190), which include, just to mention a few, archery ranges, campgrounds, fishing and casting ponds, golf courses, parks, riding and hiking trails, volleyball and badminton courts and swimming pools; but *not* the type of "youth camp" which petitioner operated on the property. The "R-R" zone also prescribes *accessory* uses (§22.40.200), which include accessory buildings and structures commonly used in connection with the permitted uses in the zone; *approved* uses (§22.40.210), which are subject to the planning director's approval; and *special* uses (§22.40.220), which require a "conditional use permit." It is only the last category which permits "youth camps." Hence, petitioner's use of Lutherglen for that purpose was permissible only pursuant to a "conditional use permit."[4] [Pet. (Opinion), p. A19]

Accordingly, even prior to the adoption of respondent's Interim Flood Protection Ordinance, the available uses of Lutherglen were relatively limited because of its

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[3] The pertinent provisions of respondent's Zoning and Planning Code, of which the Court of Appeal took judicial notice, were set out in the Appendix to respondent's supplemental brief on remand. Those same provisions also were set out in Appendix C to the Brief of Appellee filed in the previous proceeding before this Court.

[4] A "conditional use permit," like a variance or other exception granted from zoning ordinances, is not granted as a matter of right. Rather, it is "the grant of dispensation [which] is a matter of grace, and a refusal is not the denial of a conditional statutory right; it merely leaves in operation the statute adopted by the legislative body." *Rubin v. Board of Directors* (1940) 16 Cal.2d 119, 124; *Rasmussen v. County of Orange* (1963) 212 Cal.App.2d 246, 248.

location, topography and the "R-R" zoning which petitioner has not challenged.

C. The Flood And Resulting Destruction Of Lutherglen.

In July 1977, a fire destroyed approximately 3,860 acres of the watershed area upstream of Lutherglen, creating a serious potential flood hazard. [Pet. (Opinion), pp. A2-A3] Based on *petitioner's own pleadings* and the *evidence received in the trial*, the Court of Appeal was able to give this graphic description of the flood that followed:

> "On February 9 and 10, 1978, a disaster waiting to happen finally arrived. A storm droped a total of 11 inches of water in the watershed area. A giant wall of water rushed toward the fragile structures people had erected on the banks of the creek. The docile, often dry creek became a raging river and overflowed the banks of the Middle Fork and Mill Creek. The highway's culverts at MM 16.56 were inadequate to handle the volume of water. The flood drowned ten people in its path, swept away bridges and buildings, and inflicted millions of dollars in losses. Fortuitously, Lutherglen's planned camp for handicapped children scheduled for that week had been postponed. So no lives were lost on its property when the surging waters engulfed Lutherglen and destroyed its buildings." [Pet. (Opinion), pp. A3-A4]

D. The Interim Flood Protection Ordinance.

On January 11, 1979, respondent adopted Ordinance No. 11,855, as an "interim ordinance temporarily prohibiting the construction, reconstruction, placement or

enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs." It took effect immediately as an urgency measure, "required for the immediate preservation of the public health and safety."[5]

As the Court of Appeal observed, this ordinance "temporarily prohibited appellant from rebuilding the structures lost to the February 1978 flood while the County studied what permanent measures it would have to take to prevent a recurrence of the deadly event." [Pet. (Opinion), p. A20] But the ordinance had no effect on the portion of petitioner's property which was "not in the flat land near the river channel." [Pet. (Opinion), p. A20]

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[5] Section 4 of the ordinance reads as follows:

> "Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area *and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area.* If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made [because of the 'grandfather' provisions of the zoning code]." (Emphasis in original.) [Pet. (Opinion), p. 20]

Moreover, it did not deny "all use" of the property (not even the flat portion), despite petitioner's conclusory claim that it did. The court described the still permissible uses as follows:

> "It does not even prevent occupancy and use of any structures which may have survived the flood. It only prohibits the reconstruction of structures which were demolished or damaged by the raging waters and construction of new structures. In no sense does it prohibit uses of this campground property which can be carried out without the construction of demolished buildings or the erection of new ones. First English's complaint stated solely a facial challenge to the interim ordinance and *as far as this ordinance itself was concerned,* many camping activities could continue on this property. Meals could be cooked, games played, lessons given, tents pitched. (If Lutherglen had been a factory or coal mine, these sorts of uses would have meant little to the landowner. But Lutherglen is a camping facility. So uses of value to that purpose remained available during the time the interim ordinance was in effect.)" [Pet. (Opinion), p. A18, as amended, p. B2]

Thus, the petition is patently incorrect and misleading when it states that "[t]he effect of the ordinance is to convert Lutherglen into part of the channel which collects mountain runoff and transports the water to a downstream reservoir for storage." [Pet., p. 5] The ordinance did not *convert* Lutherglen into a part of the channel or create anything new. Lutherglen already was situated precisely within a *natural* drainage channel. The ordinance merely prevented petitioner from rebuilding in the same place what had been swept away *by nature.*

Finally, petitioner further attempts to mislead the Court by stating, "[t]wo and half years later the temporary prohibition was made permanent". [Pet., p.4] Under the provisions of California Government Code Section 65858, as they existed at the time the Interim Flood Protection Ordinance was enacted, any such ordinance which took effect immediately as an urgency measure "to protect public safety, health and welfare" could remain operative *no more than four months*, unless it was extended in accordance with certain strict statutory procedures. The *maximum* period it could remain in effect with all permissible extensions was *two years*. It is undisputed that Ordinance No. 11,855 was extended by appropriate action of the County for the maximum period permitted, but it necessarily expired after *two years*, some seven months before respondent adopted a permanent ordinance on August 11, 1981. Furthermore, the provisions of the permanent ordinance were not as restrictive as those of the interim ordinance. [Pet. (Opinion), pp. A21-A22]

E. **Respondent's Permanent Flood Protection District.**

Respondent's Ordinance No. 12,413, adopted August 11, 1981, created the Mill Creek Flood Protection District encompassing the same area as the interim flood protection area established by Ordinance No. 11,855. The less restrictive provisions of the permanent ordinance, and the County Planning Commission's findings which preceded its adoption, are discussed in the appellate court's opinion. [Pet. (Opinion), pp. A21-A22] The court observed that although petitioner has never amended its

complaint to allege that the permanent ordinance constituted a taking of its property, a review of that enactment is helpful to an understanding of the temporary measure. [Pet. (Opinion), p. A21]

In essence, the permanent ordinance prohibits the construction or reconstruction of *major* structures or buildings within the area designated as being subject to substantial flood hazard. But it allows the construction of "accessory building structures" within the district, if they will not impede the flow of water in the event the creek overflows its channel. This is consistent with what is referred to in the Opinion below as the "current Federal flood plain management regulations." Indeed, the ordinance was expressly adopted "to insure compliance with the requirements of the Federal Flood Protection Program." [Pet. (Opinion), pp. A21-A22][6] As the Court of Appeal observed, "[s]ince First English does not allege it

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[6] The "Federal Flood Protection Program" referred to in the Planning Commission's findings and Opinion below is the National Flood Insurance Program ("NFIP"). The NFIP makes federally subsidized insurance available to landowners of parcels located in flood prone areas, *if adequate local flood plain management laws have been enacted to minimize flood losses.* 42 U.S.C. §4001 et seq; 44 C.F.R. §§60.1, 60.2, 60.3. The regulations for compliance with the program require local agencies to adopt their own flood plain management regulations which, *inter alia*, "[p]rohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway that would result in any increase in flood levels within the community during the occurrence of the base flood discharge." 44 C.F.R. §60.3(d)(3). For a comprehensive discussion of the NFIP scheme, see *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 734-735 (5th Cir. 1988), discussed *infra*.

has been denied permits to build any alleged 'accessory buildings' we cannot know the scope of this exception." [Pet. (Opinion), p. A23]

F. The Pertinent Allegations Of Petitioner's Complaint.

Petitioner did not wait to find out what type of structures might be permitted on Lutherglen under the permanent flood protection ordinance that was contemplated on the face of Ordinance No. 11,855. Instead, petitioner commenced the instant action on February 21, 1979, a month and ten days after the Interim Flood Protection Ordinance was enacted. The *sole allegations* on which petitioner based its regulatory taking claim were: that on January 11, 1979, respondent adopted Ordinance No. 11,855, Section 1 of which prohibits construction or reconstruction within an "interim flood protection area located in Mill Creek Canyon"; that "Lutherglen is within the flood protection area created by Ordinance No. 11,855"; and that "Ordinance No. 11,855 denies First Church all use of Lutherglen." [Clk. Tr., 11, 12]

As previously pointed out, petitioner has never sought leave to amend its complaint in order to challenge the validity of the permanent flood protection ordinance, or to claim a taking based on that ordinance. Nor has petitioner ever sought permission to construct anything under the permanent ordinance. The trial in this case, which proceeded on other causes of action against respondent and the Flood Control District, did not commence until February of 1983, long after Ordinance No.

11,855 had expired by statute and the permanent ordinance had been enacted.[7]

REASONS FOR DENYING THE WRIT

1. THE COURT OF APPEAL DID NOT VIOLATE THIS COURT'S REMAND OR DENY DUE PROCESS BY DECIDING THAT PETITIONER HAD FAILED TO ALLEGE SUFFICIENT FACTS TO STATE A CAUSE OF ACTION FOR A REGULATORY TAKING

There is absolutely no merit to petitioner's contention that the Court of Appeal violated the remand order and "defied this Court's instruction to permit a factual determination of whether a taking had occurred," when it *decided that issue itself* instead of sending the case to the trial court. [Pet., pp. i (Question 1), pp. 7-10] This Court did not direct a remand to the trial court for "a factual evidentiary inquiry," as petitioner claims. Indeed, nothing in this Court's opinion purported to instruct or bind the California courts in any way regarding the *procedural*

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[7] Petitioner says that it did not amend its complaint to allege a taking under the permanent ordinance because it would have been a "futile gesture" to do so until the restrictive remedy rule established by *Agins v. City of Tiburon* (1979) 24 C.3d 266 was finally overruled by this Court. [Pet., p. 5, n. 4] But that rule only prevented petitioner from seeking compensation for any alleged regulatory taking of its property. Petitioner was at all times perfectly free, even under the California Supreme Court's *Agins* decision, to amend its pleading (or bring a separate action) for the purpose of having the permanent ordinance declared to be *invalid*, if petitioner believed it constituted an unconstitutional taking of its property. Likewise, petitioner was free to seek a permit to build any "accessory structures" which could safely be placed on the property.

manner in which the taking issue was to be resolved on remand.

What the Court of Appeal did once the case was returned to the California courts was entirely proper under California rules of appellate review. In essence, the court held that it could uphold the trial court's dismissal of the claim at the pleading stage, *if* a demurrer could have been sustained for failure to state a cause of action. The court's Opinion correctly states (and petitioner does not dispute), "[i]t is well settled that a trial court's decision is not to be reversed merely because it was based on erroneous grounds if there is an alternative rationale which will support that judgment." [Pet. (Opinion), p. A7] Indeed, that same procedural rule is followed in the federal appellate courts. *Dandridge v. Williams*, 397 U.S. 471, 475-476, n. 6 (1970); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Hence, if petitioner's complaint failed to properly allege sufficient facts to state a cause of action under California pleading rules, and petitioner plainly could not amend to do so in light of the facts established by judicial notice and the evidence in the record, the judgment was *required* to be affirmed.

Unquestionably, the Court of Appeal correctly determined that petitioner did not state a cause of action under California pleading rules. Zoning regulations are presumed to be valid exercises of the State's police power which further the public safety and the general welfare. A party claiming that a zoning ordinance has taken property must plead *specific facts* which show that the ordinance was a "property taking device rather than a regulation of the use of land." *Morse v. County of San Luis*

Obispo (1967) 247 Cal.App.2d 600, 603; *Helix Land Co. v. City of San Diego* (1978) 82 Cal.App.3d 932, 943; *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 328.[8] A bare conclusory allegation that a county ordinance deprives a property owner of all reasonable or beneficial use, without any supporting facts, is legally insufficient – especially where, as here, the subject ordinance shows *on its face* that beneficial uses are available. *Pan Pacific Properties Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244.

Indeed, California pleading rules expressly permit courts (including appellate courts) to look beyond the bare allegations of the complaint and consider "any matter of which the court is required to or may take judicial notice" in deciding whether a demurrer should be sustained for failure to state a cause of action. See California Code of Civil Procedure §430.30(a) and the other authorities cited in the opinion below (p. A19). The appellate court also correctly stated that the matters which can properly be judicially noticed include *legislative acts and enactments*. In addition to the authorities cited by the court, see California Evidence Code §§452, 459; *Pan Pacific Properties Inc. v. County of Santa Cruz, supra*, at 255, n. 2; *Edna Valley Assoc. v. San Luis Obispo County Coordinating Council* (1977) 67 Cal.App.3d 444, 449 (Resolutions of County Commission may be judicially noticed).

Petitioner complains that it objected to the court taking judicial notice of respondent's various legislative acts and enactments, but does not contend that it was

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[8] Likewise, respondent's ordinance was entitled to such a presumption under this Court's precedents. *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 595-596 (1962).

improper for the court to do so under California law. Instead, petitioner attempts to mislead this Court by totally mischaracterizing the nature of the matters which were judicially noticed as being "selective judicial notice . . . of a few facts from the County's planning files" [Pet., i (Question 2), pp. 5-6, n. 5], and "one-sidedly selected snippets of the County's files." [Pet., p. 10][9] In any event, the fact that the Court of Appeal refused to close its eyes to the actual provisions of respondent's Interim Flood Protection Ordinance and other pertinent enactments which disproved the conclusory allegations of the complaint, certainly does not raise a *federal* issue for review by this Court.

It also should be noted that what the Court of Appeal did here is precisely in accord with this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). There, the California Supreme Court's decision did not rest solely on the remedy ground later disapproved in this Court's decision in the instant case. The California Supreme Court had also concluded that a demurrer was properly sustained to the appellants' cause of action for declaratory relief, on the ground that no taking had been adequately alleged. In a unanimous decision, this Court affirmed the California Supreme Court on that ground.

The complaint in *Agins* alleged that the zoning ordinance in question would "forever preven[t] . . . development for residential use," and "completely destro[y] the value of [appellants'] property for any purpose or use whatever. . . ." *Agins, supra*, 447 U.S. 259, n. 6. Despite such allegations, the California Supreme Court held that

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[9] Petitioner also complains that documents it requested to have judicially noticed were ignored. [Pet., p. 6, n. 5] But petitioner fails to disclose what those documents were and it offers no argument or authority as to why the court was *required* (or even *permitted*) to judicially notice them.

the ordinance, on its face, did not deny appellants all reasonable use of their property because it allowed them to build between one and five residences on the property. Hence, at the most, appellants had asserted a *mere diminution* in the value of the property, which is insufficient to amount to a taking. 24 Cal.3d at 277.

In affirming, this Court observed that because the appellants had made only a *facial challenge* to the ordinance, without submitting any development plan for the property, the constitutionality of the ordinance had to be judged on its face alone. In other words, the ordinance could not be considered to amount to a taking of appellants' property unless its *mere enactment* did so. *Looking at the face of the ordinance through judicial notice,* this Court agreed that its mere enactment did not take appellants' property because it did not deny all development or use as alleged. In so doing, this Court also *specifically rejected* appellants' contention that it was improper for the California Supreme Court to have taken judicial notice of the actual terms of the zoning ordinance for the purpose of rejecting the allegations of the complaint that such ordinance prevented all use of the land. This Court noted that such judicial notice was proper under the rules of California practice which we discussed above, and concluded as follows:

> "In this case, the State Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under review. *The appellants' objections to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court.* (Citation)." (Emphasis added) 447 U.S. at 259, n. 6.[10]

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[10] To the same effect, see, *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 352, n. 8 (1986).

Accordingly, there is absolutely no merit to petitioner's contention that it was denied "due process" in this case. Petitioner's statement [at p. 10] that "[s]uch appellate judicial notice *of facts which were NOT judicially noticed by the trial court* has been repeatedly condemned by this Court as a violation of due process of law," is incorrect and deliberately misleading. Neither of the two cases cited by petitioner stands for that proposition and they have absolutely no application to the circumstances presented by this case.

In *Ohio Bell Telephone Co. v. Pub. Util. Commn.*, 301 U.S. 292 (1937), a violation of due process occurred because a state public utilities commission ordered a utility to make rate refunds, without a hearing, based on "judicial notice" of certain economic information *without any notice* to the utility that such information would be considered. To make matters worse, the judicially noticed information was not even made a part of the record, rendering judicial review of the commission's actions virtually impossible. It is hard to conceive of a fact situation more remote from the present case than that.

Similarly wide of the mark, is *Garner v. Louisiana*, 368 U.S. 157 (1961). There, the state attempted to justify a criminal conviction which it claimed had been *based* on judicially noticed "facts" about race relations in the South, even though such "facts" did not appear in the record, the defendant had never been given notice of them, and the record did not even show that the trial judge had actually considered them.

Thus, in both *Ohio Bell* and *Garner*, the claim was being made that the *lower* tribunal had based its decision on alleged judicially noticeable facts which did not appear in the record. Here, in contrast, the legislative enactments admittedly were judicially noticed for the first time on appeal, for the purpose of deciding whether

the complaint should be dismissed on a *different* ground than the one given by the trial court. As we have shown, that was entirely permissible under California law. Moreover, unlike *Ohio Bell* and *Garner*, petitioner *did receive prior notice* of the matters to be judicially noticed, and those matters are described on the face of the appellate court's opinion.[11]

2. THE COURT OF APPEAL CORRECTLY INTERPRETED AND APPLIED THIS COURT'S DECISIONS.

A. The Appellate Court Did Not Ignore This Court's "Guidance For Remand."

Petitioner contends that the Court of Appeal ignored or failed to understand this Court's "instruction" and "guidance for remand," to the effect that the Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference *amounting to a taking*." (Emphasis added) [Pet., pp. 12-13; see also, "Question 3," Pet., p. i.] As we have shown, however, the appellate court did not ignore or misunderstand this point at all. It simply concluded that petitioner was not entitled to any compensation *because* respondent's Interim Flood Protection Ordinance *did not amount to a taking*.

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[11] In California, a reviewing court may judicially notice any matters which could have been judicially noticed by the trial court, even though they were not presented to the trial court, so long as the reviewing court affords each party a reasonable opportunity to present to the court information relevant to the propriety of taking judicial notice and the tenor of the matter to be noticed. See, California Evidence Code §§ 455(a), 459(c); *People v. Terry* (1974) 38 Cal.App.3d 432, 439; *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 384.

But petitioner argues that "[t]he theme which permeates the Court of Appeal's opinion is that the County's flood protection program was necessary and therefore, the program *could not* result in a taking of First Church's property." [Pet., p. 13] Petitioner says that "idea" cannot be reconciled with this Court's above quoted conclusion that compensation is required for an "otherwise proper" interference with property [Pet., p. 13]; and, hence, the appellate court's "belief in the virtue of the County's action not only fails to satisfy the terms of the remand from this Court, it is *irrelevant*." (Emphasis added) [Pet., p. 14]

Petitioner has plainly misinterpreted both the Court of Appeal's decision and this Court's meaning. The court below did not hold that the ordinance was not a taking *solely* because it was necessary to protect lives and property. Conversely, this Court certainly did not mean that the Fifth Amendment necessarily requires compensation even though the particular interference with the landowner's use of his land is not only "proper," but needed to preserve lives and property. As we will demonstrate next, the Court of Appeal merely gave *great weight* to the importance of this factor in balancing the public and private interests, precisely as it was required to do under this Court's decision in *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 488-492 (1987).

B. The Court Of Appeal Did Not Misconstrue The Importance Of The Public Safety Purpose In Its "Taking" Analysis.

The petition states that "[t]he Court of Appeal said it perceived a 'public safety exception' in this Court's jurisprudence which would permit the County to preclude all reasonable use of First Church's property without compensation." [Pet., p. 18] Petitioner then argues that the

appellate court misconstrued the cases it cites, because "[t]he extent of the use prohibition approved by the Court of Appeal in this case goes beyond anything this Court has ever countenanced"; and that while this Court has recognized that a *particular activity* or *specific use* amounting to a nuisance may be prohibited, "[i]n none of this Court's cases has the Court held that *all* reasonable use could be prevented without compensation." [Pet., pp. 18-19]

The first and most obvious response to this contention is that it *attacks a strawman*. As we have shown, the Court of Appeal expressly found that respondent's Interim Flood Protection Ordinance *did not deny all reasonable use of the property*. Hence, petitioner's entire argument rests on a patently false premise.

Second, the Court of Appeal certainly did not misconstrue or misapply this Court's decisions when it discussed what it referred to as the "public safety exception." [Pet. (Opinion), pp. A10-A16] What the court obviously meant by that is that this Court has long recognized that reasonable regulations prohibiting uses of land which are *harmful to the public's health and safety* are not "takings" within the meaning of the Fifth Amendment. The court correctly observed that the seminal decision on this point was *Muggler v. Kansas*, 123 U.S. 623 (1897).[12]

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[12] In *Muggler*, the rule and rationale were stated as follows:

> "A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . Nor can legislation of that character come within the 14th Amendment, . . . unless it is

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Muggler is quoted at length in the opinion below. The principles enunciated in *Muggler* were reaffirmed 100 years later in *Keystone Bituminous Coal Assoc. v. DeBenedictis, supra,* 480 U.S. at 488-489, where this Court pointed out "that the nature of the State's action is critical in takings analysis." As the Court explained, "[t]he special status of this type of State action can also be understood on the simple theory that since *no individual has a right to use his property so as to create a nuisance or otherwise harm others,* the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity" (480 U.S. at 491, n. 20); and "[l]ong ago it was recognized that 'all property in this country is held under the *implied obligation that the owner's use of it shall not be injurious to the community.*' " (Emphasis added) 480 U.S. at 491-492

It is true that this Court has never held that *all* economically viable use of a parcel of property could be denied for reasons of public safety, but neither has the Court ever been faced with a case where all possible economically viable uses were dangerous. If that ultimate question were presented, the rationale of *Muggler* and

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> apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation to deprive the owner of his liberty and property, without due process of law. *The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."* (Emphasis added.) 123 U.S. at pp. 668-669.

Keystone surely would compel the conclusion that compensation is not required if a safety regulation necessarily leaves no economically viable use at all, because no such use is safe. As the Court of Appeal said:

> "[I]t would not be remarkable at all to allow government to deny a private owner 'all uses' of his property where there is no use of that property which does not threaten lives and health. . . . Indeed it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death." [Pet. (Opinion), p. A17]

But the court *did not have to so hold* in the instant case, and did not do so, precisely because respondent's ordinance did not deny petitioner *all* beneficial use of its campground property. It only prevented – temporarily – a *specific* dangerous use, i.e., the building of any new structures in a high flood hazard area.[13]

Petitioner also contends that because it has been prevented from making any reasonable use of its property, it experiences no "reciprocity of advantage" from respondent's safety ordinance. From this premise, petitioner argues that the "central justification for substantial use preclusion" does not exist; rather, petitioner says it has been "singled out to be forced to 'donate' – without compensation – all reasonable use of [its] property for the

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[13] The appellate court's decision is in no way inconsistent with *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871), as petitioner argues. [Pet., pp. 20-22] *Pumpelly* did not involve the prevention of any dangerous use of property. Rather, a landowner lost all use his property (including economically viable *harmless* uses) when it was *physically* invaded for the benefit of the public at large, as the result of *permanent flooding* from the construction of a dam. This distinction is both obvious and crucial.

greater good of the community." [Pet., pp. 22-24] This argument is fallacious for several obvious reasons.

First, "reciprocity of advantage" is only one of the rationales given for the rule. The *real* central justification for the rule is that no one has a "right" to use his property in such a way as to harm others. Second, the same restrictions which applied to petitioner's property also applied to the other properties located along Mill Creek in the canyon bottom. Since petitioner was free to carry on any camping and recreational activities on its property which did not require the construction of buildings, the building restrictions imposed on its neighbors necessarily would protect and benefit petitioner and its own invitees for the obvious reasons stated by the Court of Appeal. [Pet. (Opinion), pp. A24-A25][14]

C. The Court Of Appeal Applied The Correct Test In Rejecting Petitioner's Facial Attack On The Ordinance.

Petitioner contends that the Court of Appeal ignored this Court's standards for determining when a regulation violates the Fifth Amendment. [Pet. pp. i-ii (Questions 4, 5), pp. 16-18] The petition even calls the appellate court's opinion "defiant" in this regard. [Pet., p. 18] These claims are patently frivolous.

Since petitioner's challenge to respondent's ordinance was a mere *facial challenge*, the Court of Appeal correctly applied the standard prescribed by this Court for such challenges in *Agins v. City of Tiburon, supra*. The appellate court concluded that the mere enactment of the

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[14] In *Keystone Bituminous Coal Assoc. v. DeBenedictis, supra*, this Court noted that "[t]he Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." 480 U.S. at 491, n. 21.

ordinance did not amount to a regulatory taking, precisely because (1) it substantially advanced a legitimate state interest – indeed, the preeminent state interest in public safety; and (2) it did not deny appellant all economically viable use of its property. Petitioner acknowledges that this standard was "mentioned" by the court below, but says there is no way it could properly have been applied without a trial and evidence. [Pet. p. 17] In so doing, of course, petitioner ignores the fact that this Court itself applied that very standard in *Agins*, based only on the pleadings and judicially noticed provisions of the challenged ordinance. What we said previously in our first argument disposes of this spurious point as well.[15]

The fact that the Court of Appeal did not mention the so-called "reasonable investment backed expectations test" was not error for at least two reasons. First, petitioner *alleged no facts* to show how respondent's temporary moratorium on the reconstruction of buildings wiped out by the devastating flood could have interfered with any *reasonable* investment backed expectations it then had with respect to the property. Furthermore, this would be but one of several factors to be considered in connection with the "ad hoc factual inquiries" which this Court has said should properly be made *only* when there is a

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[15] Since this test is applied in "facial challenges" to a regulation, the only inquiry that is required is whether the property owner is left with some permissible, beneficial use of the property. So long as the remaining use is not obviously impracticable, its relative profitability or value is not relevant in a facial challenge. Hence, a property owner faces an "uphill battle" in making a facial attack. *Keystone, supra,* at 494-495; *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 294-296 (1981). To the same effect, see *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, 981-982 (9th Cir. 1987).

so-called "as applied challenged" to a land use regulation, as distinguished from a mere "facial challenge." *Williamson County Reg. Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 190-191, n. 12 (1985); *Keystone Bituminous Coal Assoc. v. DeBenedictis, supra*, at 494-495; *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, at 294-296 (1981). Hence, there was no need for the Court of Appeal to speculate on whether petitioner might have had any "reasonable investment backed expectations" that could have been interfered with, when it rejected petitioner's facial challenge to respondent's ordinance.

D. The Court Of Appeal Did Not Misinterpret Or Misapply *Nollan*.

Petitioner advances two contentions based on *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987). Both contentions are utterly without merit.

First, petitioner says that the Court of Appeal "examined the County's rationalization for its regulation by a relaxed standard of review which this Court disapproved two years ago," instead of subjecting it to "heightened scrutiny." [Pet., p. ii (Question 6), pp. 25-28] But the quote from *Nollan* appearing on p. 25 of the petition shows plainly that this Court was only saying that it was "inclined to be particularly careful" when "the *actual conveyance* of property is made a condition to the lifting of a land use restriction, since in that context there is *heightened risk* that the purpose is avoidance of the compensation requirement rather than the stated police power objective." (Emphasis added) 483 U.S. at 481. Since respondent's ordinance in the instant case did not require petitioner to convey an interest in its property, the "heightened risk" referred to in *Nollan* is not present here.

The Court of Appeal did recognize, however, that *Nollan* adds "a refinement to the test" – i.e., that "the government's regulation must advance the precise state interest which avowedly motivated the regulation." [Pet. (Opinion), pp. A15-A16] The court further held that respondent's temporary moratorium on construction for safety purposes clearly satisfied that refinement to the test. The court also pointed out that petitioner *did not allege any facts to show otherwise.* [Pet. (Opinion), p. A25] Indeed, petitioner *has not even asserted a bare argument* as to why the appellate court was wrong when it concluded that "[r]estricting the erection of structures in the flood zone along the river is calculated to substantially advance the state's legitimate interest in preventing injury and death during the next flood." [Pet. (Opinion), p. A25][16]

Lastly, petitioner argues that the decision below is contrary to *Nollan's* "holding that property owners have a right to build on their property, subject only to reasonable regulation of their conduct." [Pet., p. ii (Question 7), pp. 24-25.] Again, petitioner completely misinterprets *Nollan.* This Court expressly recognized that a building permit could properly have been denied in the case before it, *if* the condition imposed on its granting had a *proper nexus* with the legitimate state interest it purported to advance. There is absolutely nothing in *Nollan* which suggests that anyone has a constitutionally protected "right" to build on his property, if to do so would create a risk of harm to himself and others. If the rule were otherwise, all building and safety codes would be invalid. In short, the result reached by the Court of Appeal here is plainly dictated

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[16] Although petitioner contends that it should have had a trial on this issue, it has never offered a single clue as to what *facts* it could possibly assert to compel a different conclusion than that reached by the Court of Appeal.

by this Court's decision in *Keystone* and *Muggler*, and it is in no way inconsistent with *Nollan*.[17]

3. PETITIONER WRONGLY ARGUES THAT THE FLOOD PROTECTION PURPOSE OF RESPONDENT'S ORDINANCE IS IRRELEVANT.

Petitioner argues that the flood protection purpose of respondent's ordinance is irrelevant because "there is nothing about flood control which automatically immunizes flood control ordinances from constitutional examination." [Pet., p. 14] Petitioner cites "a recent case from Rhode Island" as being "instructive" on this point. [Pet., pp. 14-15] Here again, petitioner's analysis is faulty. The case cited, *Annicelli v. Town of South Kingstown* (RI 1983) 463 A.2d 133, is not in conflict with the Court of Appeal's decision here. It was decided before *Keystone*, but is not inconsistent with *Keystone's* rationale. Indeed, the Rhode Island court expressly said, "[w]e have ruled that use regulations that are reasonably necessary to protect the public health and safety are permissible exercises of the police power which do not require compensation (citations) provided that they do not become arbitrary, destructive, or confiscatory." 463 A.2d at 139.

Furthermore, the zoning ordinance actually before the court in *Annicelli* was not a true safety ordinance at all, despite petitioner's misleading description of the case. The Town had indeed attempted to justify the development restrictions which it placed on beach front property as being necessary for safety purposes – i.e., protection from coastal flooding. But the trial court had *rejected* the town's claim, and the Rhode Island Supreme

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[17] For the same reasons, the decision below is not in conflict with the New York Court of Appeals' decision in *Seawall Associates v. City of New York*, 74 NY 2d 92 (1989), as petitioner contends. [Pet., pp. 27, 28]

Court agreed with the trial court on that point. A reading of the case will show that the restrictions actually were intended to protect the *ecology* of the area, rather than to protect lives or property.

In contrast, the case of *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732 (5th Cir. 1988) is *truly* instructive on the subject of flood protection. There, Louisiana property owners were contending that local ordinances adopted in compliance with the National Flood Insurance Program resulted in an unconstitutional taking of their property.[18] After reviewing numerous decisions, both state and federal, including this Court's decisions in the instant case, *Nollan* and *Keystone*, the Fifth Circuit held that the NFIP, and local flood plain management ordinances which comply with the federal regulations, are not unconstitutional takings.

Hence, it is virtually a universally accepted proposition that denying a property owner the right to build in a

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[18] See, n. 6, *supra*. In *Adolph*, the Fifth Circuit described the NFIP as follows:

> "Under the NFIP, the federal goal is providing subsidized flood insurance for *existing* structures in flood-prone areas, while simultaneously discouraging *future* unsafe construction in such areas. (Citation) Minimizing future flooding hazards through sound flood-plain management is thus achieved through the enactment and enforcement of local ordinances. The policy has three basic purposes: (1) protection of individuals from danger, who would otherwise develop or occupy the flood-prone land; (2) *protection of other land owners from damage resulting from flood-zone development and consequent obstruction of the flood flow;* and (3) protection of the public from individual land-use decisions that later require public remedial expenditures for public works and disaster relief." (Emphasis added.) 854 F.2d at 734, n. 2.

natural flood way substantially advances the state's pre-eminent interest in preserving lives and property, and does not result in a taking under the Fifth Amendment. Any other ruling in this case would force respondent to either buy petitioner out of what *nature* has convincingly proved was a bad investment, or forego its own grave responsibility to protect the public. Neither the Constitution nor this Court's jurisprudence impose those Hobson's choices on respondent.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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